



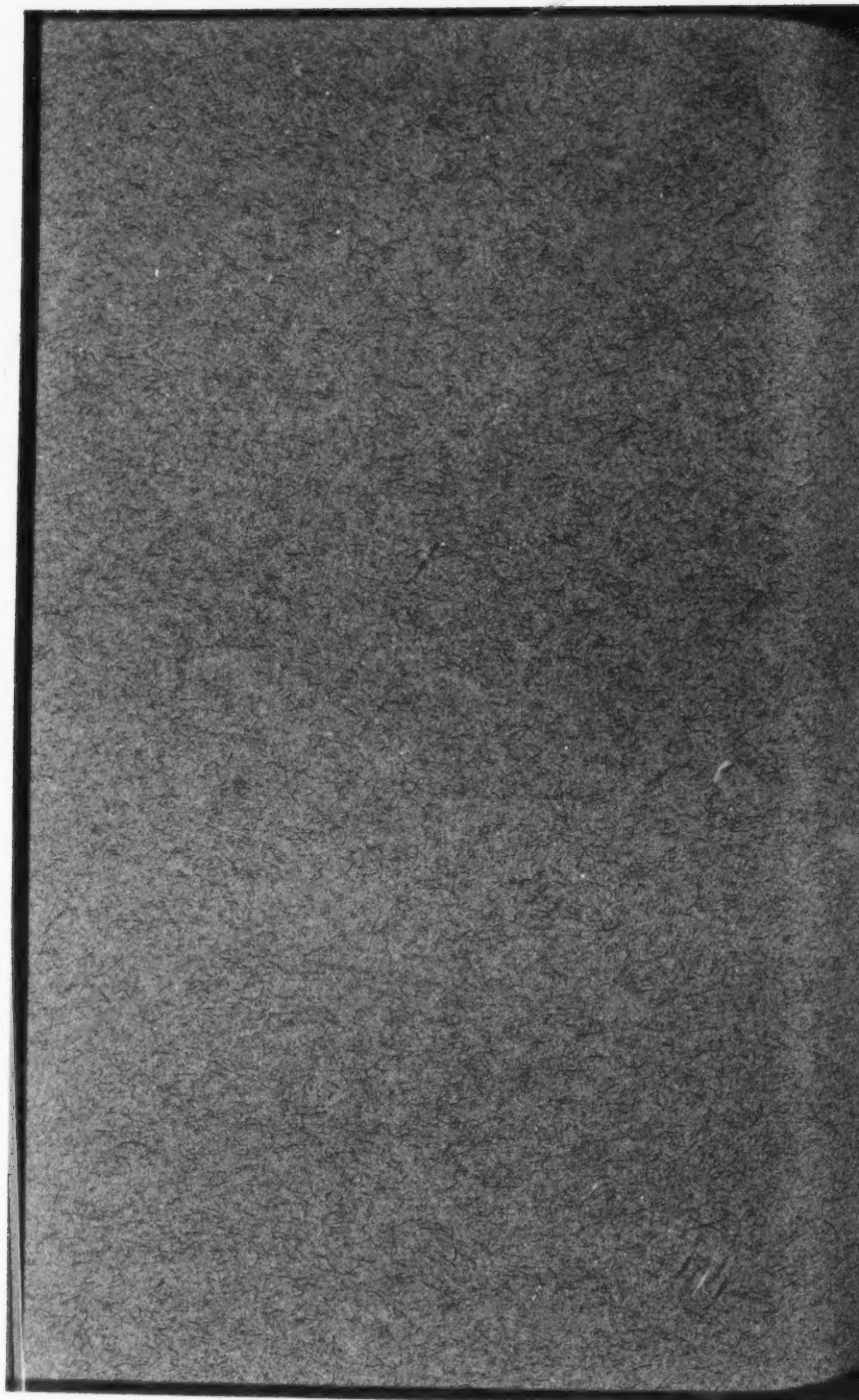
U.S. DEPT. OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C.
JUL 10 1934

John Edgar Hoover

ADOLPH LOEWENSON

ON ATTACHED FORMS, STATE DEPARTMENT
STATE OF NEW YORK
CIRCUIT

MAILED FOR



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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 588

ADOLPH T. SPALEK AND WILLIAM J. ZRENCHIK,
PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the Circuit Court of Appeals.

JURISDICTION

The order of the circuit court of appeals denying petitioners' application for bail was entered December 2, 1943 (R. 48). The petition for a writ of certiorari was filed January 8, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The Government, however, questions the jurisdiction of this Court to re-

view a ruling such as that of the Circuit Court of Appeals on writ of certiorari under Section 240 (a) (see *infra*, p. 10).

QUESTION PRESENTED

Whether the circuit court of appeals improperly denied petitioners' application for release on bail pending the disposition of their appeal by that court.

RULE INVOLVED

Rule VI of the Criminal Appeals Rules (18 U. S. C. following 688) provides:

The defendant shall not be admitted to bail pending an appeal from a judgment of conviction save as follows: Bail may be granted by the trial judge or by the appellate court, or, where the appellate court is not in session, by any judge thereof or by the circuit justice.

Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court.

STATEMENT

On November 29, 1943, petitioners applied to the Circuit Court of Appeals for the Sixth Circuit for release from custody on bail pending the disposition of their appeal by that court (R. 1-6). The allegations of that application may be summarized as follows:

Petitioners were convicted (R. 1) in the United States District Court for the Eastern District of

Michigan on an indictment (R. 2) in eleven counts charging them with causing false claims to be presented to an officer of the United States, in violation of Section 35 (A) of the Criminal Code (18 U. S. C. 80)¹ and with conspiracy to do so, in violation of Section 37 of the Criminal Code (18 U. S. C. 88). Petitioner Spalek was sentenced to imprisonment for a total of 12 years and to pay a fine of \$30,000 (R. 1). Petitioner Zrenchik was sentenced to imprisonment for a total of 7 years and to pay a fine of \$20,000 (R. 1). Prior to the verdict petitioners were at liberty on bond, but after their conviction, the trial court refused to release them on bail pending appeal (R. 2).

On November 24, 1943, the date of the sentences, petitioners filed a notice of appeal, and in that appeal they intend to urge several questions of law in addition to various alleged trial errors by the judge (R. 2).

The prosecution was based on petitioners' activities in the operation of the Spalek Engineering

¹ Section 35 (A) of the Criminal Code (18 U. S. C. 80) provides in pertinent part:

"Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof * * * any claim upon or against the Government of the United States, or any department or officer thereof, * * * knowing such claim to be false, fictitious, or fraudulent * * * shall be fined not more than \$10,000 or imprisoned not more than 10 years, or both."

Company, which is engaged in the production of tool designs for the Ford Motor Company, the Chrysler Corporation and General Motors Corporation. The latter produced war materials for the Government under so-called prime contracts either of a "cost-plus-a-fixed-fee" type or of the fixed price type. Petitioners' work for the prime contractors was done on a purchase order basis. The theory of the prosecution was that under the purchase orders petitioners were entitled to charge the prime contractors for only the hours actually worked in designing for them and at the rate fixed in the purchase orders; that petitioners charged the prime manufacturers in invoices presented for time not actually devoted to work on their behalf; that the prime manufacturers presented these invoices to the Government for reimbursement because petitioners' designs were used on work on war materials produced under a cost-plus-a-fixed-fee prime contract; that petitioners knew at the time of presenting such invoices that the prime contracts were on a cost-plus-a-fixed-fee basis and that the prime contractors would present the invoices to the Government for reimbursement. (R. 2-3.)

Petitioners' defense at the trial was that the purchase orders they received from the manufacturers were not on a time and material basis; that they did not know that the designs were to be used by the manufacturers on work under cost-plus contracts; and that there was no proof

that they intended to defraud the Government (R. 3-4).

Petitioners further alleged in their application for bail that "some of the questions of law" on their pending appeal are:

1. Their acts were not within the purview of Sections 35 (A) or 37 of the Criminal Code (R. 4).

2. They had no contractual relations with the Government. Consequently, any liability on their part must arise out of their contracts with the prime manufacturers. (R. 4-5.)

3. The liability which the Government seeks to impute to petitioners could arise only out of the acts of the prime manufacturers in dealing with the Government, with which they had nothing to do and of which they had no knowledge (R. 5).

4. The Government failed to prove the causation necessary to criminal liability (R. 5).

5. Since petitioners' invoices were approved by the prime manufacturers there was no fraud between petitioners and the manufacturers. This being so, there was no fraud committed against the Government. (R. 5.)

6. The Government failed to prove that petitioners had knowledge that the prime contracts between the manufacturers and the Government were on a cost-plus-a-fixed-fee basis (R. 5).

7. "The record does not show that the whole of any one of the prime contracts is in evidence,

although the record does show that these prime contracts are frequently being amended and the nature of the amendments, even on the Government's theory of the case, and assuming that the proofs support the Government's theory, might obviate any question of fraud on the Government by changing the nature of the prime contract" (R. 5).

8. The effect of the Renegotiation Act (50 U. S. C. App., Supp. II, 1191)² on the purchase orders is to eliminate the specific provisions for payment stated in the purchase orders, thereby making it impossible to present a false claim in the circumstances of this case (R. 5-6).

9. Various unspecified errors in the reception and exclusion of evidence at the trial and in the charge to the jury (R. 6).³

² The Act of April 28, 1942, c. 247, Sec. 403, 56 Stat. 245, as amended by the Act of October 21, 1942, c. 619, 56 Stat. 982 (50 U. S. C. App., Supp. II, 1191), provides in part:

"(c) (1) Whenever in the opinion of the Secretary of a Department, the profits realized or likely to be realized from any contract with such Department, or from any subcontract thereunder * * *, may be excessive, the Secretary is authorized and directed to require the contractor or subcontractor renegotiate the contract price. * * *"

³ Petitioners also alleged that substantial sums of money were still due them from the manufacturers (R. 6), apparently on the theory that their freedom was necessary to obtain payment from the manufacturers. But the Government's answer showed that payment was being withheld pending full audit of petitioners' claims (R. 11). Consequently there is no present need for petitioners' freedom from detention.

The Government's answer to the petition (R. 7-14), to which was annexed a copy of the indictment (R. 14-44), alleged that stripped of formal language petitioners are charged with "deliberately padding their payrolls so as fraudulently to secure from their customers large sums of money for labor never performed, with full knowledge that the Government was obligated to reimburse the customers for the payments thus secured" (R. 11-12); that the appeal presented no substantial question (R. 8); that, contrary to petitioners' allegation, all of the manufacturers' contracts offered in evidence were on a cost-plus-a-fixed-fee basis (R. 8); that all of the purchase orders which petitioners received from the manufacturers were on a time-and-material basis whereby petitioners were permitted to charge the prime contractors only for direct labor actually applied to the performance of the purchase orders at a specified rate per hour for the services (R. 8-9); that all questions relating to the construction of the purchase orders were submitted to the jury in an appropriate charge by the court (R. 9); that the manufacturers' approval of petitioners' invoices was tentative, subject to audit by representatives of the Government and the manufacturers (R. 9-10); that the proof showed that petitioners knew that the manufacturers' contracts were on a cost-plus basis and that petitioners admitted this knowledge at the trial (R.

10); that the issue of petitioners' intent to defraud the Government was submitted to the jury as a fact question (R. 10); that contrary to petitioners' allegations, the court's charge to the jury was correct (R. 10); that there was no failure to offer in evidence the whole of the prime contracts (R. 10); that the Renegotiation Act does not preclude conviction under the false claims statute, for that Act is directed at recovering excess profits and does not sanction fraud on the Government on the theory that the fraud will be discovered and the Government will be made whole (R. 10-11); that the frauds by petitioners were fully shown by the evidence (R. 12).⁴

⁴ The Government alleged (R. 12) that: "* * * It proved without contradiction or denial that the defendants on two occasions assigned many of their employees to the task of painting two houses belonging to the defendants. When these painters signed time slips for each of the days devoted to this painting, the defendants charged the time to Government jobs at the rates of hourly pay fixed by the purchase orders or subcontracts issued to them by the prime contractors. The result was that the Government actually paid more than eight thousand dollars for the time of men whose only labor during that time was this work of painting, and the defendants not only were repaid the amount of wages they had paid the painters but also received a profit of more than three thousand dollars besides. The evidence was also undisputed that in like manner and in numerous instances the defendants charged to Government jobs the time—12 hours a day—of employees while absent on vacations or on account of illness or for other reasons, and of janitors, night watchmen, and other overhead employees. In each instance the employees signed time slips

On December 2, 1943, petitioners filed a reply to the answer of the Government (R. 45-48) in which they alleged that in the trial court, after sentence had been pronounced, the following colloquy occurred between the court and counsel (R. 45):

[The court] * * * I don't see how an appeal in this case can be of any value except to delay it for a year and a half and we Americans are great forgivers and forgetters.

Mr. Kelley: I can assure your Honor it is not merely for the purpose of delay.

The Court: I know that, I know that it isn't; you have got a right to appeal; there are some legal questions that you should appeal, but I am not going to wait until this record is out.

Petitioners further alleged that although the question of whether the purchase orders were on a time and material basis was submitted to the jury, it was their position at the trial that there was not sufficient evidence to go to the jury on that question (R. 45-46); that petitioners did not know that their invoices were reimbursable by the Government, and there was no evidence that petitioners had notice that the prime contracts were on a cost-plus basis (R. 46); that the court's indicating that their time was devoted to the direct labor of designing tools, dies and fixtures to be used in war production; in each instance the defendants' books of account skillfully concealed the fraud and in each instance the Government eventually paid the bills."

charge to the jury on the question of intent was erroneous (R. 46-47); and that because of the Renegotiation Statute there was no fraud in this case from the beginning (R. 47).

On December 2, 1943, after oral argument on the application (see R. 47), the Circuit Court of Appeals for the Sixth Circuit entered an order (R. 48) denying the application for bail.

ARGUMENT

Petitioners contend (Pet. 4-5; Br. 4-7) that their appeal now pending in the court below raises several substantial questions which should be decided by that court, and that the court, therefore, erred in refusing to allow their release on bail pending the disposition of the appeal.

We do not believe that Section 240 (a) of the Judicial Code, upon which petitioners rely to establish the jurisdiction of this Court, authorizes the use of the writ of certiorari for the purpose of reviewing a ruling by a circuit court of appeals denying an application for release on bail, while the merits of the appeal remain pending before that court. See the discussion of the question and the review of the pertinent authorities in Robertson and Kirkham, *Jurisdiction of the Supreme Court*, pp. 208-210. However, assuming *arguendo* that jurisdiction does exist, we submit that petitioners do not present a question warranting review by this Court.

Rule VI of the Criminal Appeals Rules makes it clear that after a conviction, and pending appeal, a defendant may not under any circumstances be released on bail unless "it appears that the appeal involves a substantial question which should be determined by the appellate court."⁵ Conversely, if a substantial question is presented, the court or appropriate judge or justice may in the exercise of a sound discretion allow bail. *Sanchez v. United States*, 134 F. (2d) 279, 284 (C. C. A. 1), certiorari denied, *sub nom. Sanchez Tapia v. United States*, 319 U. S. 768.

In urging that their appeal raises substantial questions petitioners rely heavily (Br. 4-5) on an off-hand statement by the trial judge, out of context, that there are legal questions in the case

⁵ In its restrictive effect Rule VI is substantially similar to proposed Criminal Appeals Rule V which was prepared in the Department of Justice upon request of the Chief Justice and transmitted to him by the Attorney General on May 26, 1933. The policy considerations underlying the proposed rule were stated as follows:

"Granting bail after conviction as a matter of course has brought the administration of the criminal laws in the Federal Courts into disrepute. This sentiment is reflected in the correspondence received from the Judges and the United States Attorneys throughout the country. The prevailing practice which permits a Judge who has not heard the evidence, and is not furnished with the record, to release defendants on bail after conviction, notwithstanding the Trial Judge has concluded that there is no merit in the appeal, creates the strongest possible incentive for groundless appeals so that defendants may enjoy their liberty so long as the proceedings may be delayed."

which should be appealed. Resort, however, to the transcript of proceedings in which the statement was made (particularly when that transcript is considered as a whole) reveals that the trial judge had an entirely different view of the case.⁶ Immediately after sentencing petitioners, the trial judge, upon being advised that notices of appeal would be filed, refused petitioners' application for release on bond (Tr. 23). The judge made it clear that if a legal question were presented he might have allowed bond, but under the circumstances "I don't see how an appeal in this case can be of any value except to delay it for a year and a half and we Americans are great forgivers and forgetters (Tr. 23). * * * I have refused bail * * * chiefly from the admissions of the defendants on the stand * * *, they admit everything and then tell a cock-and-bull story that nobody, not even themselves, could hope to believe" (Tr. 24). In further reiterating his denial of bail the trial judge stated that "I don't think" the legal questions raised by petitioners "have much merit" (Tr. 28). In these circumstances it is plain that the judge's statement relied upon by petitioners was not a reflection of his considered judgment that their appeal presented substantial questions, and it is equally clear that, in denying bail, the judge was influenced by the lack of merit of the appeal and by petitioners' obvious guilt of the charges set forth in the indictment.

⁶ We have lodged with the Clerk of this Court a copy of the pertinent part of the transcript.

Those "questions of law" which petitioners intend to raise in their appeal, which are capable of evaluation, are not, we submit, substantial questions calling for appellate review. Apparently petitioners' basic contentions are that since they had no direct contractual relations with the Government, their acts are not within the proscription of the false claims statute (Br. 5) and that since the Government may recover their excess profits by virtue of the Renegotiation Act they have not in fact defrauded the Government (*supra*, pp. 5-6).⁷ In respect of the former it is now

⁷ In their notices of appeal petitioners set out the following general grounds of appeal:

"1. Failure of the trial judge to grant defendant's motion for a directed verdict made at the close of the Government's main case and, at the close of all the proofs.

"2. That the proofs failed to show a crime cognizable under the laws of the United States; that the case should not have been submitted to the jury and the indictment should have been dismissed.

"3. Numerous errors in the admission of testimony offered by the Government, which testimony was incompetent, immaterial and irrelevant and prejudicial to the defendant, which testimony and the grounds on which its exclusion was sought will be more specifically set out in the appellant's Assignments of Error.

"4. Numerous errors in refusing to admit in evidence proffered testimony of the defendant, which testimony and the reasons why it is contended it is admissible will be more specifically set out in the appellant's Assignments of Error.

"5. Because the Court committed errors in his charge to the jury, which errors will be more specifically pointed out in the appellant's Assignments of Error.

"6. Because the Court committed error prejudicial to the defendant in certain comments made on the testimony

clear from this Court's decision in *United States ex rel. Marcus v. Hess*, 317 U. S. 537, 544-545, that the false claims statute reaches "any person who knowingly assisted in causing the Government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the Government." There is a similar lack of merit in the contention that the effect of the Renegotiation Act is to eliminate the provisions for payment to petitioners contained in the purchase orders. Assuming, *arguendo*, that petitioners' premise were true, it does not follow that petitioners did not cause false claims to be filed with the Government. Every invoice showing that an employee worked on a specific government project when in fact he did other work (see footnote 4, *supra*, p. 8) plainly is a false claim and the fact that the Government may at some time by renegotiation reduce the contract

and in other comments made to the jury in his charge, all of which will be more specifically referred to in the appellant's Assignments of Error.

"7. Because the Court erred in refusing to give certain of the defendant's requests to charge, to which exception was duly taken, and which will be more specifically referred to in the appellant's Assignments of Error.

"8. That the conduct and comments of the Court during the course of the trial were unfair and prejudicial to the defendant and prevented his having a fair trial, which conduct and comments will be more specifically referred to in the appellant's Assignments of Error.

"9. That the sentence of the Court was excessive and unwarranted."

price which it formerly was obligated to pay for petitioners' products can not in any manner validate the false claims which petitioners previously caused to be filed with the Government.

Petitioners' other "questions of law" are, we think, incapable of evaluation on the basis of the meager record in this case. They relate to the sufficiency of proof, the receipt of evidence at the trial, and the court's charge to the jury (*supra*, pp. 5-6, 9). Certainly the mere assertion of such error does not raise a substantial question within the meaning of Rule VI, for, otherwise, alert counsel could raise every appeal, frivolous as it might be, to the dignity of one presenting a substantial question by merely claiming error at the trial, and, thus, completely emasculate Rule VI. There being nothing more in the record than the mere assertion of these errors, which the Government's Answer denies, it is impossible to determine whether there is any basis in the case for the claim of error or whether, if there was error, it was prejudicial.

In these circumstances it is plain that petitioners have not made it appear that any substantial question calling for appellate review is present in this case. This fact, considered together with the gravity of the offenses for which petitioners were convicted and the refusal of the trial judge to allow bail, makes it clear that in denying bail the circuit court of appeals did not abuse the discretion vested in it by Rule VI.

CONCLUSION

Petitioners' applications for bail were fully argued before both the trial judge and the circuit court of appeals, and in each instance the application was denied. The petition for writ of certiorari does not, we submit, show that on either occasion the respective courts abused their discretion. Consequently, we respectfully submit that the petition should be denied.

CHARLES FAHY,
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TOM C. CLARK,
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FEBRUARY 1944.

